In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1036

CLARENCE BROOKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. C) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1965. On January 21, 1966, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to February 18, 1966, without prejudice to the Court's consideration of the timeliness of the application. The petition was filed on February 17, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

331-002—66

QUESTION PRESENTED

Whether, in a non-jury trial, the judge was competent to render a verdict after he suppressed petitioner's confession as involuntary.

STATEMENT

On October 15, 1964, petitioner and his co-defendant, Herman McCall, were convicted by a judge sitting without a jury in the United States District Court for the Northern District of Illinois of violating federal narcotics laws, 26 U.S.C. 4705(a) and 21 U.S.C. 174. Petitioner was sentenced to imprisonment for ten years on each count, to run concurrently. The court of appeals affirmed.

1. The evidence showed that on November 20, 1962, Robert Vaughn, an informer, introduced undercover agent Carl Jackson to McCall, from whom Vaughn had purchased narcotics on prior occasions (Tr. 15, 147–148). Jackson gave McCall $125 to obtain a "spoon" of heroin (Tr. 16). After McCall made a telephone call, the three proceeded in Jackson's car to petitioner's place of business in Chicago. There McCall left the car and engaged in a conversation with petitioner, after which he returned to the car and announced that the heroin would be procured shortly (Tr. 17–18). After waiting all night in McCall's residence, Jackson and Vaughn returned to petitioner's store at 8 and 11 a.m., on November 21, and both times were told by petitioner that he had not yet obtained the heroin (Tr. 22–28). At 2 p.m. Jackson, Vaughn and McCall drove to petitioner's premises. Petitioner passed by in his automobile, which he parked in front of Jackson's car. He walked back

to Jackson's car, and, after apologizing for the delay, advised Jackson that the heroin could be found under the floor mat of petitioner's car. Jackson obtained the heroin, which had been enclosed in a glassine bag and manila envelope (Gov. Exs. 1–2; Tr. 29–41).

2. On January 23, 1963, petitioner was arrested by federal narcotics agent Connolly, who had maintained a surveillance of petitioner, and had observed him, immediately preceding the final encounter with Jackson, meet and converse with a man later identified as one of petitioner's sources of supply (Tr. 109–124, 128). Petitioner was placed in Connolly's car and they proceeded to McCall's residence. On the way, Connolly parked his car and conversed with petitioner in an attempt to solicit petitioner's cooperation (Tr. 157–163). Connolly offered to advise the United States Attorney's office of any cooperation (Tr. 190). Petitioner agreed to assist the agents and believed that his case would be dropped because of his cooperation (Tr. 379–380). At the narcotics headquarters, petitioner signed a statement admitting that he sold narcotics to Jackson. Subsequently, petitioner assisted federal agents by engaging in purchases of narcotics (Tr. 175).

At the non-jury trial, the judge heard extensive testimony concerning the voluntariness of petitioner's statement but reserved his ruling. After both sides had concluded, the judge declared (Tr. 506):

> There is pending objection to Exhibit No. 3 and I treated it as a motion to suppress. The objection is sustained and the confession is suppressed. I will not read it.

I do not want to be misunderstood. I take the evidence of the Government as the credible evidence in connection with that. I adopt the testimony. I believe it was credible. I do not believe the testimony of the defendants was credible. I believe, though, that under all the circumstances—the indictment having been not returned against Brooks at first and then later being done, indicates to me that in his mind—I do not believe there was an overt promise made to him—but in his mind, under all the circumstances, that there was such promise, some promise or belief that there had been some promise in his mind. Therefore, I suppress it.

However, on all the evidence that is presented to me, I find each of the defendants, Brooks and McCall, guilty.

ARGUMENT

Since petitioner did not obtain, within thirty days of the judgment below, an extension of time within which to file his petition, the petition is out of time. There is, in any event, no reason for further review of this case.

The record shows that petitioner knowingly and deliberately waived his right to a jury trial (Tr. 4) (*Patton* v. *United States*, 281 U.S. 276; *Singer* v. *United States*, 380 U.S. 24), and he knew that, as the inevitable result of his waiver, the trier of fact would also make the preliminary determination of the vol-

untariness of his confession.[1] Simply because a result that was "insistently invited, namely, a verdict by a court without a jury, disappointed the hopes of the accused, ought not to be sufficient for rejecting it." *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281. Therefore, petitioner should not now be heard to complain that the trial judge was apprised of the fact that there had been a confession.

At all events, judges are frequently required to disregard inadmissible evidence in determining guilt, and this procedure involves no denial of a defendant's rights. "Our jurisprudence postulates the ability of judges to dismiss from their minds, in reaching decisions, offers of evidence excluded by rulings after hearing arguments on admissibility of that evidence" (Pet. App. C). Indeed, in this very trial, the judge on several occasions was called upon to eliminate from his mind evidence applicable to only one of the two co-defendants, when considering the merits of the case against the other (Tr. 43, 129–130, 267).

The decisions relied upon by petitioner are inapposite. In *Payne* v. *Arkansas*, 356 U.S. 560, this Court determined that when the appellate tribunal

[1] This case was tried more than three months after the decision in *Jackson* v. *Denno*, 378 U.S. 368, was reported, which held that in a jury trial the judge must make the determination of voluntariness, and so keep the jury from considering an involuntary confession. Petitioner here still preferred a non-jury trial.

rules that a confession admitted in evidence was involuntary, the jury's finding of guilty must be reversed without considering whether the evidence apart from the confession could sustain the conviction, because there was no way of determining what credit and weight the jury gave to the confession. The same reasoning was applied in *Lynumn* v. *Illinois*, 372 U.S. 528, a non-jury case, where the judge admitted and considered a confession subsequently held on appeal to be inadmissible. In the instant case the judge made clear that he completely ignored the confession after ruling that it was illegally obtained (Tr. 506).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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